



ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the Procurement Executives of DOE and NNSA.

Subject: FAR Class Deviation Addressing Contractor Responsibility

References:

FAC 97-21	Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings (FAR Case 1999-010).
FAR 9.103	Policy.
FAR 9.104-1	General Standards.
FAR 9.104-3	Application of Standards.
FAR 14.404-2	Rejection of individual bids.
FAR 15.503	Notifications of unsuccessful offerors.
FAR 31.205-21	Labor relations costs.
FAR 31.205-47	Costs related to legal and other proceedings.
FAR 52.209-5	Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters.
FAR 52.212-3	Offeror Representations and Certifications--Commercial Items.

When is this Acquisition Letter (AL) Effective?

This AL is effective 10 business days from the date of issuance.

When Does this AL Expire?

This AL remains in effect until superseded or canceled.

Who is the Point of Contact?

Contact Ed Lovett of the Office of Procurement and Assistance Policy at (202) 586-8257, or ED.Lovett@pr.doe.gov

Visit our website at www.pr.doe.gov for information on Acquisition Letters and other policy issues.

What is the Purpose of this AL?

This AL forwards a FAR Class Deviation addressing Contractor Responsibility.

What is the Background?

A final rule was published in the Federal Register on December 20, 2000 (Federal Acquisition Circular (FAC) 97-21, Federal Acquisition Regulation (FAR) Case 1999-010, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, 65 FR 80255). The final rule, among other things, revised the FAR guidance for making responsibility determinations and added a new certification requirement requiring the prospective contractor to certify regarding certain violations adjudicated within the last three years. An affirmative responsibility determination must be made before the award of every contract. The certification applies to all procurements over \$100,000.

The Business Roundtable, the Chamber of Commerce, the National Association of Manufacturers, the Associated General Contractors of America, Inc., and the Associated Builders and Contractors, Inc., filed a lawsuit in the United States District Court for the District of Columbia on December 22, 2000, seeking to overturn the final rule.

The Administrative Procedure Act, 5 U.S.C. 705, gives authority for a stay of the final rule: "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." In the interest of justice, the General Services Administration believes implementation of the final rule should be voluntarily stayed.

The FAR Council has received letters from industry and Congress requesting an effective date extension from January 19, 2001, to July 19, 2001. The effective date extension will allow the Federal Government and Federal Contractors sufficient time to meet the new obligations and responsibilities imposed by the final rule. The Federal Government has similar concerns with the 30-day effective date of the final rule.

CAAC letter 2001-1 advised civilian agencies that they may authorize a class deviation in accordance with FAR 1.404 and 31.101 to deviate from the requirements of FAC 97-21, "Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings (FAR Case 1999-010)" (65 FR 80255) and immediately restore the previous FAR text including certification language.

The Procurement Executives of DOE and NNSA have determined that a class deviation is appropriate. The class deviation shall remain in effect until July 19, 2001 or until issuance of an appropriate FAR change, whichever occurs first.

CLASS DEVIATION FROM
FEDERAL ACQUISITION CIRCULAR 97-21
(Final Rule FAR Case 1999-010,
Contractor Responsibility, Labor
Relations Costs, and Costs Relating to
Legal and Other Proceedings)

Action: A final rule was published in the Federal Register on December 20, 2000 (Federal Acquisition Circular (FAC) 97-21, Federal Acquisition Regulation (FAR) Case 1999-010, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, 65 FR 80255). The final rule is immediately suspended. The previous FAR text including certification language is immediately restored. The suspension is until July 19, 2001 or until issuance of an appropriate FAR change whichever occurs first.

Contracting Officers are directed to amend solicitations already issued that incorporated a certification provision from that final rule. Instead, the previous version of the certification is to be used. Amended solicitations should use the March 1996 edition of 52.209-5, or for commercial items, the October 2000 edition of 52.212.3(h), as appropriate. An electronic version of the FAR as it existed before FAC 97-21 is posted under "FAR (Archived) HTML" for FAC 97-20 at:

<http://www.arnet.gov/far/>

The following sections were affected: 9.103(b), 9.104-1(d), 9.104-3 new paragraph (c), 14.404-2(i), 15.503(a), 31.205-21, 31.205-47(a) and (b), 52.209-5, and 52.212-3(h).

Rationale: The final rule, among other things, revised the FAR guidance for making responsibility determinations and added a new certification requirement requiring the prospective contractor to certify regarding certain violations adjudicated within the last three years. An affirmative responsibility determination must be made before the award of every contract. The certification applies to all procurements over \$100,000.

The Business Roundtable, the Chamber of Commerce, the National Association of Manufacturers, the Associated General Contractors of America, Inc., and the Associated Builders and Contractors, Inc., filed a lawsuit in the United States District Court for the District of Columbia on December 22, 2000, seeking to overturn the final rule.

The Administrative Procedure Act, 5 U.S.C. 705, gives authority for a stay of the final rule: "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." In the interest of justice, the Department of Energy and the NNSA believe that implementation of the final rule should be voluntarily stayed.

The FAR Council has received letters from industry and Congress requesting an effective date extension from January 19, 2001, to July 19, 2001.

Based on these concerns and other concerns expressed within the Federal Government, We have determined that the 30-day effective date did not give Federal contractors and the Federal Government sufficient time to meet the new obligations and responsibilities imposed by the December 20, 2000, final rule.

Consultation: In accordance with FAR 1.404 and 31.101, We have consulted with the Civilian Agency Acquisition Council Chairman before approving this class deviation to the FAR, who agrees with this deviation as does the Civilian Agency Acquisition Council. The appropriate consultation and approval have been accomplished under the authority granted to the civilian agencies under Civilian Agency Acquisition Letter 2001-1.

APPROVAL: 

Date: 2/15/01

Acting Director of Office of Procurement and
Assistance Management
Department of Energy

APPROVAL: 

Date: 2/15/01

Director of Procurement and Assistance Management
National Nuclear Security Administration